United Nations A/68/170

General Assembly

Distr.: General
22 July 2013

Original: English

Sixty-eighth session
Item 83 of the provisional agenda*
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

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Report of the Secretary-General

Summary

The present report, prepared pursuant to General Assembly resolution 65/28, contains comments and observations of Governments on the consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm.

* A/68/150.

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I. Introduction

1. The present report has been prepared pursuant to paragraph 3 of General Assembly resolution 65/28, in which the Assembly invited Governments to submit further comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, bearing in mind the recommendations made by the International Law Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 19 January 2011, drew the attention of Governments to resolution 65/28, and a reminder was sent out in January 2013.

3. The present report should be read together with the previous report of the Secretary-General (A/65/184 and Add.1).

II. Comments and observations received from Governments

Colombia

4. With regard to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Colombia observed that they did not reflect existing norms of customary international law. Rather, they constituted an exercise in the progressive development of international law. As the International Law Commission had itself acknowledged in its general commentary to the draft principles, the principles had, from their inception, been general and residuary in character; they were thus cast as a non-binding declaration rather than as a set of existing norms.

5. Accordingly, for Colombia, the principles could not give rise to any international obligations unless incorporated into an international convention negotiated by States. Colombia believed that it would be premature to consider negotiating such an instrument at the current stage. In its view, it would be best to keep the topic under consideration in the Sixth Committee of the General Assembly until the subject was deemed ripe for precise formulation and incorporation into a binding instrument.

6. In the view of Colombia, the same situation existed with regard to the articles on the prevention of transboundary harm from hazardous activities, which, their title notwithstanding, also concerned risk management.

7. Colombia recalled that, since its inception, that topic had been dealt with by the Commission on a highly experimental basis. Within the Commission, the view had always been that the articles would take the form of an international convention and, for that reason, they had been drafted in the mandatory language characteristic of such an instrument.

8. In addition, it was noteworthy that, on the various occasions when the topic had been discussed in the General Assembly, virtually no delegation had maintained

that the articles as a whole constituted a set of customary international law norms supported by sufficient State practice and *opinio juris*. The closest approximation to that position had occurred during the debate in the Sixth Committee in 2001, when some delegations had stated that, generally speaking, some provisions of the articles might be said to reflect customary international law. On the other hand, Colombia recalled that, during the debate in 2001, and again in 2007, various delegations had expressed the view that the articles were an exercise in progressive development rather than codification. During those debates, Colombia had itself stated that, under current international law, the prevention principle gave rise to a due-diligence obligation to prevent or minimize transboundary harm, but that did not mean that the existing provisions of the articles could be deemed to create specific legal obligations for States. It had also stressed that, in meeting that due-diligence obligation to prevent or minimize transboundary harm, special consideration should be given to external factors such as the parties' level of socioeconomic development, technical and scientific capacities and the specific context in which the activities that might result in transboundary harm were being undertaken.

9. In the view of Colombia, therefore, the provisions of the articles that imposed specific obligations on States did not reflect accepted norms of customary international law. As with the principles on the allocation of loss, the only way that the progressive development provisions of the articles could become legally binding would be to incorporate them into an international convention. Colombia believed that it would be premature to consider holding an international conference to examine the topic or to consider the development of such an instrument. More time was required for delegations to pursue their study of the topic and discuss the various implications in the Sixth Committee.

El Salvador

10. El Salvador commented that it was important to recognize that the duty of prevention was not limited to the articles; it had a much broader scope insofar as it was part of the international *corpus juris* on environmental matters, and it was an obligation that required due diligence by States and the adoption of appropriate measures before actual harm occurred.

11. El Salvador also drew attention to article 4, on cooperation, which in its view was extremely important in order to ensure the effectiveness of environmental preservation and protection, in particular where national capacity needed to be strengthened with the help of other interested States. Article 4 provided that States were to "seek" the assistance of competent international organizations in preventing transboundary harm. The scope of that provision was explained in the commentary, where the Commission had noted that, even if there were competent international organizations, they could extend necessary assistance only in accordance with their constitutions. In any case, the article did not purport to create any obligation for international organizations to respond to requests for assistance independent of their own constitutional requirements. Given that El Salvador agreed with the clarification provided in the commentary to article 4, it suggested, in the interests of further clarifying the wording, that "seek" should be replaced by a less imperative term, such as "request".

12. Furthermore, the content of article 10 was extremely useful because it dealt with factors to be taken into consideration in order to achieve an equitable balance of interests among States, including the economic viability of the activity, its nature and importance, the degree of risk of significant transboundary harm and the risk of significant harm to the environment. El Salvador considered that each of those factors must be considered in good faith and in appropriate depth in order to achieve the desired balance. To strengthen the content of the article, it might include additional factors to be taken into account by interested States, such as the degree of vulnerability of the population to the impact of the activity and its capacity to adapt to the resulting changes; and the identification of activities that caused irreversible damage, in which case it was not feasible to maintain the basis for the quality of life and the health of ecosystems in a sustainable manner.

13. On the issue of the final form of the articles and principles, El Salvador first noted that, in the light of their supplementary nature, it was essential for the articles and the principles to be included in a single document in order to ensure full coverage of the topic. To do otherwise might affect the consistency of their provisions, given that priority might be given to only one of the stages leading to the production of the damage. For example, it would be wrong to focus the debate on the future form of the articles alone, thereby emphasizing prevention while excluding all matters relating to compensation of the victims of damage and restoration of the environment.

14. El Salvador was also of the view that the General Assembly should approve the elaboration of a binding convention, which would allow the parties to take appropriate measures to avoid or prevent serious transboundary harm; minimize the risk of causing it; and mitigate its effects. On the basis of consultations held with the competent national authorities on environmental matters, it considered that such a convention would be extremely important to El Salvador owing to the existing risks associated with its various resources, in particular its water resources, and that it would have the benefit of promoting the principle of good-neighbourliness between States. In the view of El Salvador, it was therefore time to take the steps necessary to launch a process aimed at the elaboration of a convention on the basis of the articles and principles, which would represent a significant contribution to establishing general rules for the prevention of transboundary harm from hazardous activities and allocation of loss in the event of such harm.

Netherlands[1]

15. The Netherlands stated that it was not aware of any instance in which it had pleaded or relied upon either the articles on the prevention of transboundary harm from hazardous activities or the principles on the allocation of loss in the case of such harm.

Philippines

16. The Philippines reported that, through the Environmental Management Bureau of its Department of Environment and Natural Resources, it had implemented the

[1] For previous comments, see A/65/184, paras. 16-18.

multilateral environmental agreements relevant to the issue of hazardous wastes to which it was a party, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Stockholm Convention on Persistent Organic Pollutants. As the competent agency in charge of the implementation of its international obligations, as well as its national laws, policies and regulations, including Republic Act No. 6969, the Bureau had been provided with the proper support and capacity-building assistance to allow it to abate or minimize risks to public health and the environment.

17. The Philippines made a number of suggestions with regard to the articles on the prevention of transboundary harm from hazardous activities.

18. For article 1, Scope, the words "between States concerned" could be added following "physical consequences".

19. Given that resolution 65/28 was intended to prevent transboundary harm occurring as a result of hazardous activities, such as loss and damages, it was necessary to include a definition of the term "loss and damages" under article 2, Use of terms.

20. Under article 2, the definition of the term "harm" should include the cause of the harm, while the definition of the term "transboundary harm" should also state the source and nature of the harm.

21. The definition of the term "transboundary harm" must also be expanded to specify the type of exposure or contact that caused the harm, in particular whether the harm was through water, air, land or the transboundary movement of people, goods or services.

22. The term "hazardous activity" should also be included under article 2. The activity should be classified by its nature (industrial, disposal, accidental or another activity that might be defined as a "hazardous activity").

23. With regard to article 5, it should indicate that States must also establish regulatory mechanisms and implement related programmes and activities to minimize or prevent the occurrence of transboundary harm caused by hazardous waste.

24. For article 11, the phrase "or until the imminent harm, actual loss or damage has been effectively managed and controlled by the State of origin" should be added.

Portugal[2]

25. Portugal noted that the adoption of the articles and the principles was a positive step towards the creation of measures for the minimization of the harm and loss that might result from incidents involving hazardous activities and of measures allowing prompt and adequate compensation to victims of transboundary harm.

26. In the view of Portugal, the agenda item should be analysed bearing in mind the history of the subject and the purposes of the progressive development of international law and its codification, which should be harmonious and coherent. In

[2] For previous comments of Portugal, see A/65/184, paras. 29-35.

that connection, it was important to recall that the prevention of transboundary harm, on one hand, and international liability in the case of loss from transboundary harm, on the other, were part of the same topic (international liability for injurious consequences arising out of acts not prohibited by international law). Its two aspects, namely prevention and allocation of loss, should therefore be considered together, with equal legal nature and enforceability.

27. Portugal expressed the hope that in the future it would be possible to have a single convention on international liability for injurious consequences arising out of acts not prohibited by international law where the liability of the State in the matter was adequately established and a real system of compensation due as a result of effects of lawful activities of States was put in place. For the time being, it would already be significant to consolidate a whole set of draft articles or even of draft principles addressing prevention and allocation of loss, for the sake of a possible conference to adopt the aforementioned convention.

Qatar

28. Qatar reported that it had not yet adopted the articles on prevention of transboundary harm from hazardous activities or the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

29. Qatar proposed, with regard to the principles, that principle 8, Implementation, should include an item urging regions that were similar environmentally and geographically to develop regional conventions among themselves in relation to the implementation of the subject of the principles.

United States of America[3]

30. The United States expressed the belief that the draft articles on prevention marked a positive step towards encouraging States to establish means to address such issues as notification in specific national and international contexts. The principles on allocation of loss were also a positive step towards encouraging States to establish mechanisms to provide prompt and adequate compensation for victims of transboundary harm. They incorporated progressive ideas such as the responsibility of operators, the desirability of backup financial security measures, the importance of prompt response measures and broad concepts of compensable harm. They also stressed the importance of national, bilateral, regional and sectoral arrangements to carry out those ideas. The Commission was urging States to take national and international action to implement the principles, and the United States similarly urged national action and State-to-State agreements in specific contexts, as that was what the principles were designed to encourage.

31. The United States strongly supported retaining the draft articles on prevention and the draft principles on allocation of loss in their current form. As it had previously noted, both documents went beyond current international law and practice and were clearly innovative and aspirational in character rather than descriptive. Both documents were designed as resources to encourage national and

[3] For previous comments of the United States, see A/65/184/Add.1, paras. 1-3.

international action in specific contexts, rather than to form the basis of a global treaty.

32. Accordingly, the United States continued to believe that it was most appropriate for the principles to take the form of non-binding standards of conduct and practice and for the work on prevention to remain formulated as draft articles. Retaining the current recommendatory form of the draft articles and principles increased the likelihood that they would gain widespread acceptance and fulfil their intended purpose.